STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2011
v	No. 297390 Oakland Circuit Court
JARRELL MARQUISMOS BROWNLEE, Defendant-Appellant.	LC No. 09-227627-FH

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and brandishing a firearm in public, MCL 750.234e. The trial court sentenced him to probation for three years and 183 days in jail for the felonious assault conviction, and time served for the brandishing a firearm conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

Defendant's convictions arise from a "road-rage" incident that occurred on July 3, 2009, at approximately 12:30 p.m., on I-75, near Troy, Michigan. On that date, Joel Beck was driving his car southbound on I-75. Beck passed the car defendant was driving, cutting him off. Beck testified that defendant was obviously upset and waved a gun at him. Defendant admitted that he had a gun in his car and that it was loaded and the safety was off, but he denied that he pointed the gun at Beck.[1]

Defendant first argues that prosecutorial misconduct deprived him of due process and a fair trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context, and in light of defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's statements is determined from an evaluation of the statements in light of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Where impermissible comments

[1] Defendant had a permit to carry the gun and was not charged with carrying a gun illegally.

are made by a prosecutor in response to arguments previously raised by defense counsel, reversal is not mandated. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993).

Defendant did not object to the prosecutor's allegedly improper comments. Review is therefore precluded unless a timely objection could not have cured the error or a miscarriage of justice would result. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Unpreserved claims of prosecutorial misconduct are reviewed for plain (outcome determinative) error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Plain error occurs at the trial court level if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We ultimately "will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). In addition, this Court cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *Unger*, 278 Mich App at 235. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions. *Id.*

Defendant contends that the following comments made by the prosecutor during rebuttal closing argument denigrated defense counsel and were therefore improper:

> Now, talk about misleading. Defense counsel continuously wants to talk about the tinting of the windows as if everything that Joel Beck saw was colored, if you will, or darkened by the tinting of these windows. So I'm asking you, ladies and gentlemen, if you ask for no other exhibits ask for Exhibit 1 and ask for Exhibit 2. Because number 1, there's no question as to how far this window was rolled down. Exactly how much room there is, where there is absolutely no tint.
>
> Exhibit number 2 gives you an idea of what you can and can't see if the window was rolled up all the way. Take a look at the driver side rear window and see if you can see the front passenger seat, the silhouette of that, anything that's behind the car. Take a look and see if you are absolutely blinded, cannot see a thing because of these tints.
>
> * * *
>
> And keep in mind if you ask to see the defense counsel's exhibits, A, B and C, specifically the photographs, because I would ask you to take a good look at those photographs and compare them with the photographs that you have. The photographs that I've presented to you, those exhibits, those were on July 3rd, 2009. The officers took photos of what the day was like, the sun level, what the car looked like, where the windows were rolled down. If you take a look at defense counsel's exhibits it's a rainy or overcast day, the windows are completely up, it's not the same that Joel Beck was seeing on July 3rd, 2009.

A prosecutor may not denigrate the defense by suggesting that counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, as observed above, a prosecutor's comments must be considered in light of defense counsel's arguments. *Thomas*, 260 Mich App at 454. The victim's ability to see if defendant was brandishing a gun was at issue at trial. During closing argument, the prosecutor asserted that the windows of defendant's car were tinted and that the window was down. She also suggested that even if the window was up, silhouettes of objects could be observed despite the tinted windows. Defense counsel asserted during closing argument that there was no dispute that defendant's car windows were tinted and that the windows "were down somewhat." Defense counsel asserted that the victim stated that he could "'see a little bit in there'" and that he could see about an inch of what he thought was the barrel of a gun sticking out of the window. According to defense counsel, the inch was the only thing the victim saw that was not behind the tinted window. Defense counsel also asserted that it was up for the jury to decide whether it was possible for the victim to see the silhouette of a gun.

The prosecutor's comments during rebuttal closing argument were a proper response to defense counsel's closing argument. Defense counsel's closing argument suggested that it would have been difficult for the victim to see the gun or the silhouette of a gun through a tinted window and that the victim only saw about an inch of what he thought was the barrel of a gun sticking out of the window. It was not improper for the prosecutor, in response to such argument, to discuss the tinting of the windows and how far the window was open and to encourage the jury to view photographs of defendant's car so that the jurors could see how far the window was open and observe the tinting of the windows and make their own determination regarding whether the silhouette of a gun could be observed through the tinted windows. Furthermore, any prejudice that may have resulted from the prosecutor's comments could have been alleviated by a curative instruction given a timely objection. *Unger*, 278 Mich App at 235.

Defendant also argues that the prosecutor denigrated defense witness Camillia Irizarry, when she stated during closing argument:

> Ladies and gentlemen, I submit to you that it just doesn't make sense that the defendant's testimony is self-serving. Cami is trying to be a good friend, she really didn't see anything and she's trying to shed the most favorable light on what she does know to favor her friend. I'm not submitting to you that she's lying, I just submit that she's got selective memory and that she's trying to paint it in the best light possible for him.

The prosecutor's comments about Irizarry were not improper. The prosecutor did not assert that Irizarry was lying, but suggested that Irizarry's testimony was not credible. A prosecutor may comment on the credibility of a witness during closing argument. *People v Lodge*, 157 Mich App 544, 550; 403 NW2d 591 (1987). It is particularly appropriate for a prosecutor to comment on the credibility of a witness during closing argument where, as here, there is conflicting testimony and the defendant's guilt depends on whose story the jury believes. *Thomas*, 260 Mich App at 455. Furthermore, the trial court instructed the jury that it was to decide which witnesses it believed and that in doing so, the jurors should rely on their own common sense and everyday experience. This instruction cured any possible error caused by the prosecutor's comments about Irizarry.

Defendant next argues that he was denied effective assistance of counsel. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To demonstrate ineffective assistance, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Because defendant failed to raise the issue of the effectiveness of defense counsel in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

Defendant asserts that defense counsel was ineffective for failing to admit defendant's cell phone bill. Decisions regarding what evidence to admit are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court will not second-guess counsel on matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* The failure to present evidence constitutes ineffective assistance of counsel only if the defendant is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *Id.*

According to defendant, the cell phone bill was the crux of his defense because the bill would have corroborated the defense's theory of the time-frame of events and would establish that defendant was talking to Irizarry on his cell phone at the time he was allegedly assaulting the victim. The evidence at trial did not establish a precise time the offense occurred, but rather a time frame of around 12:30 p.m., on July 3, 2009.[2] At trial, there was testimony that defendant was following Irizarry, who was driving her own car, around the time of the incident. There was also evidence that defendant and Irizarry had six or seven cell phone conversations at about the time the incident in question occurred. Defendant's cell phone bill shows that there was a series of brief cell phone conversations between defendant's cell phone and another number, which defendant identified as Irizarry's number. One of these calls occurred at 12:39 p.m. Although the cell phone records were not admitted into evidence, defendant was permitted to observe

[2] Defendant argues that the police report, which was not admitted into evidence, states that the incident occurred at precisely 12:39 p.m. Officer Adam Sinutko prepared the police report and testified that it stated that the incident occurred at 12:39 p.m. However, Sinutko asserted that in police reports, the time that an incident occurred is often established by statements from witnesses. He further asserted that 12:39 p.m. was "either the—the time that I was actually dispatched to the call or the time the call was received by the dispatcher from the initiating caller." According to Sinutko, he could not say for certain that the gun was pulled at 12:39 p.m., and "[i]t probably was some . . . time before that."

them, during questioning by defense counsel, to refresh his recollection regarding the precise times he made cell phone calls to Irizarry. Defendant testified that he called Irizarry on his cell phone at 12:39 p.m. on the date of the incident.

Defense counsel's decision not to admit defendant's cell phone bill was a matter of trial strategy and did not deprive defendant of a substantial defense. To the extent that defendant asserts that he could not have committed the offense because he was talking on the cell phone with Irizarry at the time, defendant and Irizarry both testified regarding the many brief cell phone conversations they had around the time of the offense, and defendant specifically testified that he was talking to Irizarry at 12:39 p.m. Thus, there was evidence from which the jury could have inferred that defendant was talking on the cell phone at or near the time of the offense. Moreover, the premise of defendant's argument in this regard is flawed for two reasons. First, as noted above, the evidence established an approximate time during which the offense occurred, not a precise time of 12:39 p.m. Second, defendant's argument presumes that defendant would have been unable to talk on the cell phone and brandish a gun at the same time. The two activities are not necessarily mutually exclusive, even though defendant was driving at the time. The absence of the cell phone records did not deprive defendant of a substantial defense, and defense counsel was not ineffective in not admitting the cell phone records into evidence.

Defendant also asserts that defense counsel was ineffective in failing to object to the prosecutor's comments during rebuttal closing argument and the prosecutor's comment during closing argument suggesting that Irizarry was not credible. Declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy. *Unger*, 278 Mich App at 242. Moreover, as stated above, the prosecutor's comments were not improper. Therefore, any objection would have been futile. Defense counsel is not ineffective for failing to make a futile objection. *Ackerman*, 257 Mich App at 455.

Defendant further argues that defense counsel was ineffective in failing to request CJI2d 5.11. Counsel's decision concerning whether to request or refrain from requesting a jury instruction is usually a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). CJI2d 5.11 instructs the jury: "You have heard testimony from [a witness who is a police offer/witnesses who are police officers]. That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness." The use note to CJI2d 5.11 provides that the "instruction is discretionary and *may* be given upon request." (Emphasis added.) Our review of the record shows that the trial court did, in fact, give CJI2d 5.11. Defendant's argument in this regard is without merit.

Defendant finally argues that the trial court erred in allowing two police officers to testify regarding the similarities and characteristics of semi-automatic firearms without certifying them as expert witnesses. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). An abuse of discretion occurs only when the trial court's decision falls outside the range of "'reasonable and principled outcome[s].'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Because defendant failed to object at trial, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

At trial, the victim testified that the gun that defendant brandished was a 9 millimeter (mm) handgun. In fact, defendant's gun was a .380. Officer Ryan Whiteside testified that he was trained in firearms, that he was familiar with 9 mm guns and that the gun in defendant's car looked like a 9 mm. Officer Whiteside testified regarding the similarities between 9 mm handguns and a .40 caliber gun. Officer Sinutko similarly testified that he was familiar with different types of guns and that he received training regarding different types of weapons. Officer Sinutko also described the similarities between a 9 mm handgun, a .40 caliber and a .380. He further testified that one could not always tell from a distance if a gun is a 9 mm, a .40 or a .380.

MRE 702 governs expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 701 governs opinion testimony by lay witnesses and provides that a lay witness may testify regarding "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." A police officer may provide lay opinion testimony if the testimony is rationally based on the officer's perception and helpful to a clear understanding of a fact in issue. See *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

In this case, the officers' testimony was not dependent upon scientific, technical or other specialized knowledge. MRE 702. Rather, the testimony was based on the officers' perceptions of defendant's gun and their knowledge, training, experience and familiarity with firearms. Moreover, the testimony was helpful to a clear understanding of a fact in issue because it explained how the victim could have improperly identified defendant's gun as a 9 mm when it was actually a .380. Therefore, the officers' testimony was proper lay opinion testimony under MRE 701. Because the testimony was not improper, there was no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad